

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
OFFICE OF THE HEALTH INSURANCE COMMISSIONER
1511 PONTIAC AVE BLDG 69-1
CRANSTON, RI 02920

In Re:	Blue Cross Blue Shield of Rhode Island)	
	Rates Filed May 15, 2015 for Individual Market Plans)	OHIC-2015-1
)	

ATTORNEY GENERAL'S MOTION FOR RECONSIDERATION

Now comes the Attorney General and respectfully files this Motion for Reconsideration of the Health Insurance Commissioner's ("Commissioner") August 3, 2015 Order and Decision ("Order"). That Order rejected Finding of Fact Number 33 contained in the Hearing Officer's Report and Recommendation with respect to the May 15, 2015 Rate Filing made by Blue Cross and Blue Shield of Rhode Island ("Blue Cross") for its Direct Pay line of business. Pursuant to the Office of the Health Insurance Commissioner's ("OHIC") Rules and Regulations 1 Section 3, Rhode Island Department of Business Regulation's ("DBR") Rules and Regulation 2 Section 19 and Rhode Island General Laws § 42-35-1 et seq., the Attorney General submits the following in support of the within Motion for Reconsideration.

I. TRAVEL

Rhode Island General Laws § 27-19.2-3(1) mandates that Blue Cross provide "affordable and accessible health insurance." Moreover, under this law, Blue Cross must also "employ pricing strategies that enhance the affordability of health care coverage...."¹ Additionally, R.I. Gen. Laws § 42-14.5-1 charges the Commissioner with guarding the solvency of health

¹See R.I. Gen. Laws §27-19.2-10(3).

insurance carriers. The Commissioner must only approve rates that are fair and reasonable to Blue Cross and Blue Cross's members.

The Commissioner has jurisdiction to review the Direct Pay rate filing that was submitted by Blue Cross on May 15, 2015. See R.I. Gen. Laws §§ 27-19-6, 27-20-6, 27-19.2-1 et seq., 42-14-5, 42-14.5, 42-35-1 et seq. Raymond Marcaccio, Esq. was appointed by the Commissioner as her designee ("Hearing Officer") to conduct the public hearing in accordance with the provisions of the Administrative Procedures Act, R.I. Gen. Laws §§42-35-1, et seq. The public hearing commenced on July 7, 2015 and was completed by July 8, 2015. On July 19, 2015, the Attorney General, Blue Cross, and OHIC, submitted post-hearing briefs to the Hearing Officer for his review. On July 27, 2015, the Hearing Officer issued a thirty-five (35) page Report and Recommendations with Findings of Facts and Conclusions of Law, addressing the reasonableness of the requested rate increase. The burden of proof that the proposed rates are consistent with the statutory requirements explained above, rests exclusively with Blue Cross. After reviewing all the evidence presented and the parties' post-hearing briefs, the Hearing Officer concluded that "Blue Cross has not satisfied its burden of proving that the modified proposed rates increase...is consistent with the proper conduct of its business and also in the interest of providing affordable health insurance coverage to the public." See Report and Recommendation page 35. On August 3, 2015, the Commissioner issued her final Order in this matter. The Order was less than two (2) pages in length and adopted and accepted the Hearing Officer's recommendations findings of facts, and conclusions of law with two (2) exceptions.

The two (2) points at issue were heavily contested at the public hearing. In sum, Blue Cross experienced an unexpected financial gain totaling approximately \$16 million in 2014. Specifically, Blue Cross received approximately \$10 million from the Federal Transitional

Reinsurance program, \$577,730 from the Federal Risk Adjustment program, and a \$6 million surplus from the 2014 Direct Pay premiums. It is Blue Cross's intention to deposit the amounts it received from the Federal Transitional Reinsurance and Federal Risk Adjustment Programs to its capital reserves and retain its approximately \$6 million surplus from its 2014 Direct Pay line of business gains. Blue Cross has also requested that the Commissioner approve a 3% contribution to its capital reserves. The Attorney General, OHIC, and the Hearing Officer all concurred that permitting Blue Cross to retain the \$16 million and receive a 3% increase to reserves was not appropriate.

In his report, the Hearing Officer recommended that "the surplus generated from the premiums (amounting to approximately \$6 million) shall be used to benefit Blue Cross's capital reserves," but that the "federal adjustment to the percentage paid on high claims (\$4.7 million) and the risk adjustment (\$577,730) should be used as a dollar-for-dollar adjustment to the 2016 rates for the Direct Pay market." See Report and Recommendations page 25. The Hearing Officer also recommended a 3% contribution to reserves "in order to strengthen Blue Cross' financial foot." Id. The recommendations with respect to these two (2) points, addresses the two somewhat competing statutory requirements – that Blue Cross's 2016 rates are fair and reasonable while at the same time protecting Blue Cross's financial situation. (The Hearing Officer's finding of fact number 33 relate to the recommendations discussed above).

DISCUSSION

II. THE COMMISSIONER'S AUGUST 3, 2015 ORDER FAILS TO STATE FINDINGS OF FACT TO SUPPORT HER DECISION AS REQUIRED BY STATUTE, SUBSTANTIALLY AFFECTING THE ATTORNEY GENERAL'S ABILITY TO ADEQUATELY REPRESENT THE PUBLIC.

A. Unlike the Hearing Officer's Report and Recommendation, the Commissioner's Order is bereft of any explanation supporting her decision.

The Hearing Officer's report dedicates approximately seven (7) pages to the proper handling of the contribution to reserves and the impact of the federal subsidies. Specifically, the report clearly explains each party's position on the issue and repeatedly cites to the record to sustain each point. See Report and Recommendation at 19 ("[Blue Cross] noted that the capital reserves for Blue Cross are inadequate...Blue Cross could lose adequate reserves in a single rate year"). See also id. at 24 ("OHIC is opposed to permitting Blue Cross to add the unanticipated federal subsidies to its capital reserves...[OHIC] supports the application of the additional monies received from the Transitional Reinsurance program (\$4.7 million) as well as the Risk Adjustment subsidy of approximately (\$577,730) to be applied to directly reduce the 2016 rates for the Direct Pay market"). See also id. ("The Attorney General expresses similar concerns to that of OHIC, but has an alternative approach for dealing with the additional federal subsidies"). In the end, the report leaves no question as to what factors the Hearing Officer considered in reaching his conclusion. See also id. at 25 ("While each of the parties has presented compelling arguments in support of their respective positions, I am persuaded that the more appropriate approach is that offered by OHIC").

In contrast, however, the Commissioner's 2 page Order contains no explanation or basis why she rejected the two (2) points. Specifically, the Commissioner's Order states:

The Commissioner adopts and accepts the Report and Recommendation of the Hearing Officer, including its Findings of Fact, and Conclusions of Law, with the following exceptions:

1. As to the additional 2014 Reinsurance Payment of \$4.7 million, the Commissioner does not accept the Hearing Officer's recommendation (at p. 25 of the Report and Recommendation) and Finding of Fact Number 33 (at p. 33 of the Report and Recommendation) regarding the treatment of the additional \$4.7 million payment from the 2014 Federal Transitional Reinsurance program. The Commissioner finds and decides instead that the additional 2014 Reinsurance Payment may be retained by Blue Cross to be added to its capital reserves without any reduction to the request by Blue Cross for a 3 percent contribution to reserves.

2. As to the 2014 Federal Risk Adjustment subsidy of approximately \$577,730, the Commissioner does not accept the Hearing Officer's recommendation (at p. 25 of the Report and Recommendation) and Finding of Fact Number 33 (at p. 33 of the Report and Recommendation) regarding the treatment of the 2014 Federal Risk Adjustment subsidy. The Commissioner finds and decides instead that the 2014 Federal Risk Adjustment subsidy may be retained by to be added to its reserves without any reduction to the request by Blue Cross for a 3 percent contribution to reserves.

Wherefore it is hereby ORDERED that the modified rate increase recommended by and set forth in the Report and Recommendation of the Hearing Officer, with the aforementioned exceptions, is APPROVED.

These unsupported statements by the Commissioner are completely inapposite to the testimony of the witnesses and the exhibits entered into the record, which support fully the Hearing Officer's recommendation and findings of fact.² It is significant that the Hearing Officer's recommendation – that using the reinsurance payment and the Federal Risk Adjustment subsidy as a “dollar-for-dollar adjustment to the 2016 rates for the Direct Pay market” – was the recommendation made by OHIC at the hearing. However, the bare-bones Order makes it impossible for the Attorney General, and the public, to know and understand the basis for the Commissioner's decision.

² See AG Ex. A pp. 13-14, AG Ex. AS, AGBN-11, AGBN-12, AGBN-14, AG Ex. H, BC Ex. 1 pp. 048-049, 087, Tr. 7/7/15 pp. 237-243; Tr. 7/8/15 pp. 147-151, 182-188.

B. The Commissioner's Order fails to satisfy the requirements of R.I. Gen. Laws § 42-35-12.

Rhode Island General Laws § 42-35-12 provides, in pertinent part:

Any final order adverse to a party in a contested case shall be in writing or stated in the record. Any final order shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If a party, in accordance with agency rules, submitted proposed findings of fact, the order shall include a ruling upon each proposed finding.

The Attorney General is statutorily charged with representing the rights of Blue Cross's members during these Direct Pay hearings. See R.I. Gen. Laws §27-36-1. The Attorney General's obligation to the public necessarily includes his ability to determine whether it is the best interest of the public to appeal the Commissioner's Order in this matter. This cannot be adequately accomplished when the Commissioner's decision does not include findings of fact "accompanied by a concise and explicit statement of the underlying facts supporting the finding." Id. Our Supreme Court has held that "[a]n administrative decision which fails to include findings of fact required by statute, cannot be upheld." See Sakonnet Rogers, Inc. v. Coastal Resources Management Council et al., 536 A.2d 893, 896 (R.I. 1988). See also East Greenwich Yacht Club et al. v. Coastal Resources Management Council et al., 118 R.I. 559, 376 A.2d 682 (R.I. 1977) ("The absence of required findings makes judicial review impossible...and fails to satisfy the statutory requirements of § 42-35-12"). See also Arrow Transportation Co. v. United States, 300 F. Supp. 813, 817 (D.R.I. 1969) ("[T]he rationality of an agency's decision must encompass its fact findings, its interpretation of the pertinent law, and its application of the law to the facts found"). Indeed, our Supreme Court has remanded agency decisions that fail to meet the requirements of R.I. Gen. Laws § 42-35-12 back to the administrative agency for

further proceedings. See R.I. Gen. Laws § 42-35-15(g). See also, East Greenwich Yacht Club et al. v. Coastal Resources Management Council et al., 118 R.I. 559, 376 A.2d 682, 687 (R.I. 1977).

Given current case law, if this matter is appealed directly to the Superior Court, it is entirely possible the Superior Court would remand the Order back to OHIC immediately for further proceedings. The Attorney General is concerned that any further delay could substantially affect the public's ability to obtain health insurance coverage by January 1, 2016. Accordingly, the Attorney General respectfully requests that the Commissioner grant the Attorney General's Motion for Reconsideration and issue an Order that provides findings of fact and "a concise and explicit statement of the underlying facts supporting the findings." See R.I. Gen. Laws § 42-35-12. In the alternative, the Attorney General respectfully requests the Commissioner adopt the Hearing Officer's Recommendation on page 25 of his Report and Finding of Fact Number 33 fully, or at least in part, to grant relief to Blue Cross's Direct Pay rate payers.

III. RECONSIDERATION IS WARRANTED IN LIGHT OF THE EX PARTE COMMUNICATIONS THAT OCCURRED AFTER THE HEARING AND PRIOR TO THE ISSUANCE OF THE DECISION.

On July 29, 2015, the Attorney General and Blue Cross were informed by email from Legal Counsel for OHIC, Mr. Herb Olsen, of certain communications between the Commissioner and OHIC's actuary, Mr. Charles DeWeese. These communications directly related to the Blue Cross Direct Pay filing and occurred after the hearing was completed but before the Commissioner issued her Order. According to a July 29, 2015 email, the Commissioner requested that Mr. DeWeese calculate what the rate increase would be if the Hearing Officer's recommendations were adopted by the Commissioner. Mr. DeWeese complied with her request. All the parties agree that these communications and the submission of an

additional report not already in evidence, constitute impermissible *ex parte* communications in violation of OHIC rules and regulations and R.I. Gen. Laws § 42-35-13.

Ex parte communications are prohibited under DBR Rules and Regulation 2 Section 23 (which has been adopted by OHIC per OHIC Rules and Regulation 1 Section 3) and by R.I. Gen. Laws § 42-35-13. DBR Regulation 2 Section 23 reads:

No person who is a Party to or a participant in any proceeding before the Department or the Party's counsel, employee, agent or any other individual acting on the Party's behalf, shall communicate *ex parte* with the Hearing Officer or the Director about any matter related to the proceedings, and the Hearing Office and/or the Director shall not request or entertain any such *ex parte* communications. The prohibitions contained above do not apply to those communications which relate solely to general matters of procedure and scheduling.

Rhode Island General Laws § 42-35-13 reads:

Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render an order or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate; but any agency member:

- (1) May communicate with other members of the agency, and
- (2) May have the aid and advice of one or more personal assistants.

As part of this process, on May 15, 2015 Mr. Herb Olsen, Legal Counsel for OHIC and its consulting actuary, forwarded to all OHIC staff, its actuarial consultant, the Attorney General and Blue Cross a memorandum entitled "Review of health insurance rates- administrative hearings – *ex parte* communications." The memorandum states, in relevant part:

After the filing of rates in Blue Cross Individual Market Rate Review, and until the Commissioner issues her decision in the matter, the Commissioner will not make any substantive communications with any person or party concerning the Rate Review except upon notice and an

opportunity for all parties to participate. R.I. Gen. Laws § 42-35-13. See also Arnold v. Lebel, 941 A.2d 813 (RI 2007). Champlin's Realty Associations v. Tikoian, 989 A.2d 427 (RI 2010).

OHIC's Legal Counsel will participate in the Blue Cross Individual Market Rate Request as OHIC's representative during the administrative hearing process. Any substantive communications by OHIC staff or OHIC's actuarial consultants relating to the Blue Cross Individual Market Rate Request may be considered by the Commissioner and the Hearing Officer only through OHIC's Legal Counsel, so that such communications can be provided to the Commissioner and the Hearing Officer only after notice to the parties and an opportunity to be heard." (Emphasis added).

Legal counsel for Blue Cross, Ms. Kristen McLean, first addressed the consequences of the *ex parte* communication to OHIC, indicating these contacts "...should not have happened without notice to the parties and an opportunity to participate" (July 29, 2015 email from Blue Cross to OHIC Counsel, the Attorney General and the Hearing Officer) and she asked for a copy of the initial request for this information from the Commissioner (which we have subsequently learned was verbal). The Attorney General echoed Blue Cross' concerns.

As a result of this situation, on July 30, 2015, Blue Cross, OHIC, and the Attorney General delivered a joint letter to the Commissioner, expressing our concerns over the *ex parte* communications. The Attorney General added additional estimated preliminary calculations projecting the rate increase if the Commissioner were to adopt all of the Hearing Officer's recommendations so that the Commissioner would not have only the numbers provided by Mr. DeWeese in her mind while making her decision. In addition, the parties respectfully requested that the Commissioner not consider the calculations provided by either Mr. DeWeese on July 29, 2015 or the Attorney General into her final Decision, but instead consider "whether to accept or reject the Hearing Officer's recommendations with respect to each element of the rate calculation addressed in the Report and Recommendation of the Hearing Officer, and issue a final decision

that addresses each element and assumption accordingly, without indicating the effect each element will have on the rate.” See July 30, 2015 Joint Letter to the Commissioner.

It is significant that OHIC, in its May 15, 2015 memorandum, prohibited this exact type of behavior and cited controlling Rhode Island case law to emphasize the significance in avoiding this situation. See David Arnold v. Ronald Lebel, 941 A.2d 813 (R.I. 2007) (“[t]he function of [R.I. Gen. Laws § 42-35-13] is to prevent litigious facts from reaching the decision-maker off the record in an administrative hearing.”). See also Champlin’s Realty Associates v. Michael Tikoian v. Coastal Resources Management Council, 989 A.2d 427 (R.I. 2010) (“If a decision-maker in an administrative proceeding intends to consult any documentary source or person concerning facts or opinions about merits of an appeal, he or she must notify the parties so that they may contest any such evidence and cross-examine any people consulted”). See also Ratcliffe v. Coastal Resources Management Council, 584 A.2d 1107 (R.I. 1991) (“An agency is bound, of course, by its own regulations”).

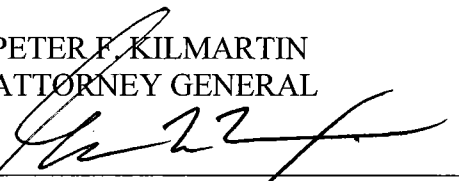
In light of the fact that the Commissioner’s Order fails to provide any indication of what factors she considered in making her decision, coupled with the apparent and admitted *ex parte* communications, the Attorney General respectfully requests that the Commissioner grant the Attorney General’s Motion for Reconsideration and provide the parties with an Order that satisfies the requirements of R.I. Gen. Laws § 42-35-12. In particular, the Attorney General respectfully requests that the new Order include findings of fact “accompanied by a concise and explicit statement of the underlying facts supporting the findings” as to her two exceptions wherein she did not adopt the Hearing Officer’s Report and Recommendations. See R.I. Gen. Laws § 42-35-12. In the alternative, and in the interests of resolving this situation in an expeditious fashion, the Attorney General respectfully requests the Commissioner adopt the

Hearing Officer's Recommendation on page 25 of his Report and Finding of Fact Number 33 fully, or at least in part, to grant relief to Blue Cross's Direct Pay rate payers.

Respectfully submitted,

STATE OF RHODE ISLAND
BY ITS ATTORNEY,

PETER F. KILMARTIN
ATTORNEY GENERAL

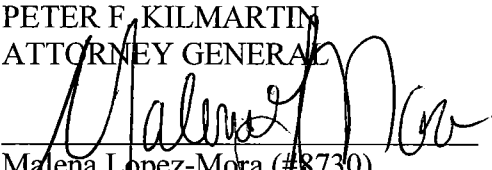


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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2015 a copy of the within Motion to Reconsider was sent *via* electronic mail and inter-office mail to **Herbert W. Olson, Esq.**, Office of the Health Insurance Commissioner, 1511 Pontiac Avenue, Bldg. 69-1, Cranston, RI 02920 herb.olson123@gmail.com; and **Nicole Renzulli, Administrative Officer**, Office of the Health Insurance Commissioner, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920 nicole.renzulli@ohic.ri.gov; and sent *via* electronic mail and first class mail to **Kristen McLean, Esq.**, Blue Cross Blue Shield of Rhode Island, 500 Exchange Street, Providence, RI 02903 kristen.mclean@bcbsri.org; and **Raymond A. Marcaccio, Esq.**, Hearing Officer, 55 Dorrance Street, Suite 400, Providence, RI 02903 ram@om-rilaw.com.

